Staff Summary Report

Tempe

To: Mayor & City Council
Thru: City Manager

Agenda Item Number 12b
Meeting Date: 4/26/01

SUBJECT: **HAYDEN FERRY SOUTH - EASTSIDE MILL AVE REQUEST FOR PROPOSALS / DEVELOPMENT AND DISPOSITION AGREEMENT AND RELATED DOCUMENTS**

PREPARED BY: Patrick Flynn, Assistant City Manager (480-350-8221)
Dave Fackler, Development Services Manager (480-350-8530)

BRIEF: Request approval of Development and Disposition Agreement and related documents between the City of Tempe and MCW Tempe Mill, L.L.C. for the redevelopment of property located on the east side of Mill Ave. between 4th Street and the Rio Salado Parkway.

COMMENTS: **RIO SALADO MASTER PLAN (0112-07-03)** Approval is requested of a Development and Disposition Agreement and related documents between the City of Tempe and MCW Tempe Mill, L.L.C. for the redevelopment of property located along the east side of Mill Ave. between 4th Street and the Rio Salado Parkway.

Document Name: (20010426casg02) Supporting Documents: Yes.

SUMMARY: The MCW Tempe Mill, L.L.C. (the "Developer") responded to the City's March 31, 2000 RFP, which in part, called for the development of a mixed-use development project on an approximate 4.1 acre (reduced to 3.12 acres) site located along the eastside of Mill Ave between 4th & 2nd Streets in Downtown Tempe. MCW Tempe Mill, L.L.C. was selected as prime developer for the site with exclusive rights to negotiate a Development and Disposition Agreement with the City for the development of the site. This site has been combined with the previously approved Hayden Ferry South development to create a new Hayden Ferry South development site of approximately 13.77 acres in size.

HISTORY AND FACTS: Attached for the City Council's review and approval is a Hayden Ferry South Second Amended and Restated Development and Disposition Agreement and related documents for the development of a mixed-use project on an approximate 13.77 acre site which combines the approximate 3.12 acre site located along the eastside of Mill Ave. between 2nd and 4th Streets in Downtown Tempe (the

RFP site) with the 10.65 acre, previously approved, Hayden Ferry South development site. The Development and Disposition Agreement (DDA) between the Developer and the City provides for the development of a 462,000sf (reduced from the 728,500sf. proposal) mixed-use development, containing office, retail, restaurant and residential uses. The project will also contain a 1250 space parking structure that will serve the development and the historic buildings along the eastside of Mill Ave. between 4th & 5th Streets.

The Conceptual Plan, which is part of the DDA, provides for the mixed-use development to be contained below the 1180ft elevation line of Hayden Butte creating an additional six (6)acres of parkland on the north and west faces of the Butte and reducing the development site to approximately 7.8 acres. The DDA also calls for rehabilitation and reuse of the historic flourmill and silos and provides for a historic façade easement to be provided to the City after the rehabilitation is complete. Approval of the DDA and the Conceptual Development plan will supercede and vacate the previously approved DDA for Hayden Ferry South and the previously approved Hayden Ferry South PAD. Combining the two development sites into one has also required the negotiation of a new development schedule. The DDA requires that the first phase of the combined development move to construction prior to September 30, 2002.

Also attached for the City Council's review and approval is a Non-Contingent Agreement of Purchase and Sale ("Purchase Agreement"), which provides that the City buy certain property and improvements within the development for public use. These property and improvements include the approximate six (6) acres for parkland, 250 public parking spaces and streetscape improvements to Mill Ave and Rio Salado Parkway. Total cost of these public use improvements is $11,850,000. The Purchase Agreement has a delayed closing date of July 15, 2003. This delayed closing should provide the Developer and City sufficient time to obtain development financing and create an Improvement District to pay for the public use improvements. The Developer will pay all debt service payments related to the Improvement District. In turn, the City will rebate a portion of the future on-site sales tax generated by the development to repay the Developer for the City's $11,850,000 portion of the Improvement District (see fiscal note for details).

FISCAL NOTE: The estimated project cost for the 462,000 sq ft mixed use development is in excess of $100 million. As indicated above, the City's participation amounts to $11,850,000. The City is buying certain property and improvements within the development for

public use including; approximately 6 acres of parkland, 250 parking spaces and streetscape improvements. The City will pay for its participation by granting the developer an 8 year GLPET tax abatement as well as an 80% rebate (on 1.8% rate) on sales tax collections in the project until the City's obligation is paid (estimated 15 year timeframe).

If the project does not proceed on the planned timetable and the developer is unable to secure the necessary long-term financing and equity requirements to complete the project, the City will need to honor the purchase contracts (deferred closing date of 7/15/03) that are a part of this agreement and pay the $11,850,000 to the short-term lender on the project. If this should occur, the City will instead acquire the entire Hayden Ferry South parcel including all development rights. In essence, the City will have acquired the entire Hayden Ferry South Project. If the City is required to pay the money in 2003, it will obviously have significant impact on the City's CIP in that year. To mitigate the impact, the City could remarket the developable portion of this property to another party or repackage it with other parcels in order to offset City monies. In all cases, we will be preserving land above the 1180' elevation point.

RECOMMENDATION: Approval of the attached Development and Disposition Agreement and Non-Contingent Agreement of Purchase and Sale between the City and the Developer, substantially as presented.

NONCONTINGENT AGREEMENT OF PURCHASE AND SALE

THIS NONCONTINGENT AGREEMENT OF PURCHASE AND SALE (the **"Agreement"**) is made and entered into this __ day of _____, 2001, by and between **MCW TEMPE MILL, L.L.C.**, an Arizona limited liability company (**"MCW"**), **TEMPE MILL PARKING, L.L.C.,** an Arizona limited liability company (**"Parking"**) and **TEMPE MILL STREETSCAPE, L.L.C.,** an Arizona limited liability company (**"Streetscape"**) (MCW, Parking and Streetscape are collectively the **"Seller"**), and **THE CITY OF TEMPE,** an Arizona municipal corporation (**"Buyer"**) and is as follows:

1. PURCHASE PROVISIONS.

1.1 Agreement and Property. Upon and subject to the terms, conditions and provisions set forth herein, Seller agrees to sell, transfer and convey to Buyer, and Buyer agrees to purchase and acquire from Seller, at the Close of Escrow, the following Property, as collectively defined below:

A. MCW agrees to sell, transfer and convey to Buyer and Buyer agrees to purchase and acquire from MCW that certain real property described on Exhibit A, attached hereto, and incorporated herein by this reference (the **"Park Land"**). In addition, MCW agrees to sell, transfer and convey to Buyer and Buyer agrees to purchase and acquire from MCW a light rail transit right-of-way at the location specified on Exhibit B, attached hereto, and is incorporated herein by this reference (the **"Transit Right-of-Way"**).

B. Parking agrees to sell, transfer and convey to Buyer and Buyer agrees to purchase and acquire from Parking approximately 250 parking spaces (the **"Parking Spaces"**), which Parking Spaces will be located in the development to be constructed by MCW pursuant to the Conceptual Plan identified on Exhibit C, attached hereto and incorporated by reference, and partially located on the "Developer's Property" as set forth on Exhibit D, attached hereto, and incorporated herein by this reference.

C. Streetscape agrees to sell, transfer and convey to Buyer and Buyer agrees to purchase and acquire from Streetscape certain roadway and right-of-way improvements as described on the attached Exhibit E, which is incorporated herein by this reference (the **"Streetscape Improvements"**).

This Agreement constitutes three (3) distinct Agreements of Purchase and Sale, one between each of the Sellers and Buyer, as each Seller has a distinct interest in or rights to real property to transfer and convey to Buyer. The parties are entering into a single Agreement, rather than three (3) Agreements, for convenience only and the fact that a single Agreement is utilized shall not be deemed or interpreted to mean that there are not distinct and separate purchase and sale transactions between each of the Sellers and Buyer. For purposes of this Agreement, Property is collectively defined as the "Park Land," the "Transit Right-of-Way," "Parking Spaces," and "Streetscape Improvements."

1.2 Purchase Price. The purchase price (**"Purchase Price"**) for the Property shall be as follows:

A. The Purchase Price for the Park Land and Transit Right-of-Way shall be $4,549,700.

B. The Purchase Price for the Parking Spaces shall be $4,838,000.

C. The Purchase Price for the Streetscape Improvements shall be $2,464,300.

The Purchase Price shall be paid to Escrow Agent in immediately available funds, for the benefit of Seller, at least one (1) day before the Required Closing Date. Nothwithstanding anything else contained in this Agreement or the Second Amended and Restated Development and Disposition Agreement of even date (the "Development Agreement"), the Purchase Price shall be reduced to the amount necessary to pay the Lender in full all outstanding amounts under the loans.

1.3 Escrow Agent. The parties will deliver a copy of this Agreement to Fidelity National Title Insurance Company (**"Escrow Agent"**) and establish an escrow for this transaction. This Agreement, together with Escrow Agent's printed form Escrow Instructions, shall constitute Escrow Instructions to Escrow Agent for the handling of this transaction.

1.4 Concurrent Closing Requirement. The parties agree that no transaction described in this Agreement shall close unless all three (3) transactions described in this Agreement are ready and eligible for closing, and do close simultaneously. Therefore, if any of the three (3) transactions subject to this Agreement is not ready to close simultaneously with the others on or before the Required Closing Date described below, for any reason whatsoever (such as the failure of the parties to form the Improvements District required under the Development Agreement), then the parties agree that Seller shall sell, transfer and convey (by a Special Warranty Deed from MCW) to Buyer and Buyer shall purchase and acquire from Seller the entire Developer's Property described on Exhibit D, attached hereto, and incorporated herein by this reference, including all development rights, in lieu of the sale of the Property from Seller to Buyer described in Paragraph 1.1 above, and, in such case, all references hereinto the Property shall mean and refer to the Developer's Property. The Purchase Price for the Developer's Property would be $11,850,000, to be paid to Escrow Agent in immediately available funds, for the benefit of Seller, at least one (1) day before the Required Closing Date. Notwithstanding anything else contained in this Agreement or the Development Agreement, the Purchase Price shall be reduced to the amount necessary to pay the Lender in full all outstanding amounts under the Loans.

1.5 No Contingencies. The parties agree and acknowledge that there are no contingencies to the obligations of Seller to sell or of Buyer to buy the Property or, as provided in Paragraph 1.4 above, the Developer's Property; provided, however, that Escrow Agent can provide the required title policy and satisfy the other requirements set forth in Paragraph 3.1(G) below.

1.6 Seller's Right of Substitution. Buyer expressly agrees and acknowledges that the individual entities constituting Seller have entered into loan transactions (the **"Loans"**)

with BNC National Bank (which, with its successors and assigns shall be **"Lender"**), that Seller has assigned their rights under this Agreement to Lender and that Lender is relying upon Buyer's non-contingent obligation to purchase the Property, or, as provided in Paragraph 1.4 above, the Developer's Property, subject to satisfaction of the requirements set forth in Paragraph 3.1(G) below. In addition, Lender is receiving a first priority Deed of Trust and Assignment of Rents on the Developer's Property from MCW as security for all of the loans from Lender to Seller. Buyer agrees to accept performance of the Seller's obligations to close the transactions described herein from Lender or any entity designated by Lender, subject to the requirements of this Agreement, and Buyer or Seller shall have no right or ability to terminate this Agreement, refuse to close the transactions described herein or otherwise refuse to perform under this Agreement by reason of such other party standing in the place and stead of Seller.

2. REPRESENTATIONS AND WARRANTIES OF SELLER AND BUYER.

2.1 Seller's Representations and Warranties. Each of MCW, Parking and Streetscape represents, warrants and agrees as follows:

A. Each of MCW, Parking and Streetscape has the full power and authority to enter into this Agreement. Each of MCW, Parking and Streetscape has full power and authority to carry out the transaction contemplated hereby to be carried out by it. All persons signing this Agreement and/or any documents and instruments in connection herewith on behalf of MCW, Parking and Streetscape has full power and authority to do so. All necessary action has been taken to duly authorize the execution and delivery of this Agreement and all documents and instruments contemplated by this Agreement, and the performance by MCW, Parking and Streetscape of the covenants and obligations to be performed and carried out by it hereunder.

B. The execution, delivery and performance by MCW, Parking and Streetscape of this Agreement and such other instruments and documents to be executed and delivered in connection herewith by MCW, Parking and Streetscape does not, and will not, result in any violation of, or conflict with or constitute a default under, any provision of any agreement of MCW, Parking and Streetscape or any mortgage, deed of trust, indenture, lease, security agreement, or other instrument or agreement to which such entity is a party, or any judgment, writ, decree, order, injunction, rule or governmental regulation to which it is subject.

C. None of MCW, Parking and Streetscape is prohibited from consummating the transaction contemplated by this Agreement by any law, rule, regulation, instrument, agreement, order or judgment.

D. Seller will not create any new or additional title exceptions of any kind on or affecting the Developer's Property during the pendency of this transaction, excepting only those approved by Buyer or created with the participation of Buyer under the Development and Disposition Agreement of even date herewith.

2.2 Buyer's Representations and Warranties. Buyer represents, warrants and agrees as follows:

A. This transaction and Agreement were fully approved by the Tempe City Council on April 26, 2001. The named Buyer has the full power and authority to enter into this Agreement. Buyer has full power and authority to carry out the transaction contemplated hereby to be carried out by it. All persons signing this Agreement and/or any documents and instruments in connection herewith on behalf of Buyer have full power and authority to do so. All necessary action has been taken to duly authorize the execution and delivery of this Agreement and all documents and instruments contemplated by this Agreement, and the performance by Buyer of the covenants and obligations to be performed and carried out by it hereunder.

B. The execution, delivery and performance by Buyer of this Agreement and such other instruments and documents to be executed and delivered in connection herewith by Buyer does not, and will not, result in any violation of, or conflict with or constitute a default under, any provision of any agreement of Buyer or any mortgage, deed of trust, indenture, lease, security agreement, other instrument or agreement to which Buyer is a party, or any judgment, writ, decree, order, injunction, rule or governmental regulation to which it is subject.

C. Buyer is not prohibited from consummating the transaction contemplated by this Agreement by any law, rule, regulation, instrument, agreement, order or judgment.

2.3 No Other Representations. Except for the express representations and warranties set forth above, Buyer agrees and acknowledges Seller is not making, has not made and has not authorized any other party to make any representations, warranties, guaranties or agreements to or for the benefit of Buyer or on which Buyer may or will rely or has relied.

3. CLOSE OF ESCROW. With respect to this transaction and the Escrow, the "Close of Escrow" shall be deemed to have occurred when (i) all closing documents required hereunder have been delivered to, received by and/or executed by the appropriate parties hereto; (ii) recordation of either (a) the Special Warranty Deed for the Park Land, Transit Right-of-Way and the Parking Spaces, or (b) as provided in Paragraph 1.4 the Special Warranty Deed conveying the Developer's Property to Buyer, has occurred; and (iii) all funds required to be paid hereunder have been properly delivered to the Escrow Agent and are available for distribution by the Escrow Agent from the Escrow in accordance with the terms and provisions of this Agreement.

3.1 Closing Date. Escrow shall close (**"Closing"**) on or before July 15, 2003 (**"Required Closing Date"**). Notwithstanding the foregoing, the parties agree that if Seller is not prepared to effectuate a Closing on the required Closing Date and Lender has declared a default under the Deed of Trust and Assignment of Rents on the Hayden Flour Mill Property and any other loan documents, Lender shall have a reasonable period of time to complete its default proceedings and any required foreclosure, trustee sale or similar proceeding to obtain title to the Developer's Property such that Lender may consummate this transaction in the place and stead of Seller as provided in Paragraph 1.6 above, and the Required Closing Date shall be postponed accordingly.

3.2 Seller Deposits. On or before Close of Escrow, the applicable Seller shall deposit (or cause to be deposited) the following:

A. Special Warranty Deed utilizing Escrow Agent's standard form, for the Park Land, Transit Right-of-Way and Parking Spaces, unless Paragraph 1.4 is applicable.

B. If applicable under Paragraph 1.4, a Special Warranty Deed utilizing Escrow Agent's standard form, for the Developer's Property. Seller has executed, acknowledged and delivered to Escrow Agent this Deed, and Escrow Agent is irrevocably and unconditionally instructed to record the Deed upon receipt of the payment by City under Paragraph 1.4 above.

C. Proof of the existence of each Seller and the authority of the person signing on behalf of such Seller.

D. A non-foreign person certification utilizing a form acceptable to the Internal Revenue Service with respect to Section 1445 of the Internal Revenue Code, such that Buyer is not required to make a withholding from any Seller's proceeds under this Agreement.

E. Escrow Agent's commitment to issue either (i) a policy of title insurance providing for ALTA extended coverage, insuring that Buyer has acquired title to the Park Land, Transit Right-of-Way and Parking Spaces in the amount of the Purchase Price therefor, or (ii) if Paragraph 1.4 is applicable, a policy of title insurance providing for ALTA extended coverage, insuring that Buyer has acquired title to the Developer's Property, in either case subject only to the title exceptions shown on Exhibit F, attached hereto and incorporated herein by this reference, and any others approved by or created with the participation of Buyer, and the normal printed exceptions, exclusions and conditions customarily set forth in Escrow Agent's preprinted title policy form; provided, however, that if there are any other title exceptions, Buyer, will still close this transaction, but at Closing, at Buyer's option, it may receive a full assignment of the loan documents between Lender and Seller, expressly including but not limited to the Deed of Trust and Assignment of Rents from MCW to Seller on the Developer's Property, with the full right to enforce the same against Seller, the guarantors of Seller, and the Developer's Property Seller shall pay the premium for a Standard Coverage Policy and Buyer shall pay all other premiums and charges.

3.3 Buyer Deposits. Buyer shall deposit (or cause to be deposited), by cashier's check acceptable to Escrow Agent or by wire transfer of immediately available funds, the amount set forth in the Settlement Statement of Escrow Agent as reasonably approved by the parties (consistent with this Agreement), to be paid by Buyer at Close of Escrow.

3.4 Prorations; Closing Costs. All prorations, including real property taxes, shall be made as of the Closing Date. All real property taxes and assessments shall be prorated on the latest valuation and tax rate information available to Escrow Agent as reasonably approved by the parties. Aside from the title insurance policy described in Paragraph 3.2E, the parties will equally divide Escrow Agent's fees, recording fees and other Closing costs.

3.5 General. All payments shall be in United States currency. Buyer and Seller shall execute and deliver any additional documents required under this Agreement or necessary to complete the agreement as provided herein, both prior to and following Close of Escrow. Possession and risk of loss in connection with the Property (or the Developer's Property, if

applicable) shall be transferred by Seller to Buyer at Close of Escrow. Escrow Agent shall close Escrow when it is in a position to issue a binding commitment to issue its title insurance policy as required for the Property and to otherwise perform under these Escrow Instructions.

3.6 Tax Reporting. Escrow Agent, as the party responsible for closing the transaction contemplated hereby within the meaning of Section 6045(e)(2)(A) of the Internal Revenue Code of 1986, as amended (the **"Code"**), shall file all necessary information, reports, returns, and statements (collectively, the **"Tax Reports"**) regarding this transaction as required by the Code, including without limitation the Tax Reports required pursuant to Section 6045 of the Code. Escrow Agent further agrees to indemnify and hold Buyer, Seller, and their respective attorneys and brokers harmless from and against all claims, costs, liabilities, penalties, or expenses resulting from Escrow Agent's failure to file the Tax Reports.

3.7 Casualty Insurance; Damage or Destruction. The parties expressly agree and acknowledge that during the pendency of this transaction, MCW, as the owner of the Developer's Property, will maintain casualty insurance for at least $250,000.00, naming Buyer as an additional insured, but shall not be required to maintain any other casualty insurance thereon, and Buyer consents thereto. If any damage or destruction of the Developer's Property occurs during the pendency of this transaction, MCW shall take all necessary action to secure the property and comply with all applicable safety codes, laws and other governmental requirements, but shall not be obligated to rebuild, repair or restore the damaged improvements and Buyer agrees to accept title to the Property or the Developer's Property, as applicable, subject to any such damage or destruction; provided, however, that at closing under the alternative of Paragraph 1.4, Buyer shall receive a credit for any insurance proceeds payable to MCW in excess of the costs incurred under this sentence. The parties agree and acknowledge that Lender will be the loss payee under the policy, and will control the proceeds thereof subject to this paragraph.

4. DEFAULT. If either party breaches any warranty or representation contained herein or at any time fails to comply with or perform any of the covenants, conditions, agreements or obligations required to be performed by said party hereunder, said party failing to perform shall be entitled, after receipt of written notice from the other party setting forth the specific failure to perform, defect or other problem resulting from said party's failure to comply with the terms and provisions hereunder, to five (5) days in which to cure the failure to perform, defect or other problem and if the same is not cured on or before the expiration of said cure period, then an event of default shall have occurred and the non-defaulting party shall be entitled to all rights and remedies available at law or in equity, including specific performance and damages. THE PARTIES AGREE THAT SPECIFIC PERFORMANCE SHALL BE AN AVAILABLE REMEDY FOR EACH PARTY IN THE EVENT OF A DEFAULT BY THE OTHER PARTY, GIVEN THE UNIQUE NATURE OF THE PROPERTY AND THE IMPOSSIBILITY OF DAMAGES PROVIDING AN ADEQUATE REMEDY. WITHOUT LIMITING THE FOREGOING, THE PARTIES AGREE THAT THE PARTIES HAVE MADE VARIOUS AGREEMENTS CONCERNING THE PROPERTY, INCLUDING SELLER GIVING UP CERTAIN RIGHTS CONCERNING THE PROPERTY, IN THAT DEVELOPMENT AND DISPOSITION AGREEMENT DATED APRIL 26, 2001 BETWEEN THE PARTIES, AND SELLER EXPRESSLY WOULD NOT ENTER INTO THAT AGREEMENT, NOR WOULD LENDER PROVIDE THE LOANS, UNLESS SPECIFIC PERFORMANCE OF BUYER'S OBLIGATIONS UNDER THIS AGREEMENT IS

AVAILABLE AT THE OPTION OF SELLER (OR LENDER UNDER PARAGRAPH 1.6) AND SELLER AND LENDER ARE DETRIMENTALLY RELYING THEREON.)

5. COMMISSIONS. Each party represents and warrants to the other that it has not dealt with any real estate brokers or salesmen, finders or other persons or entities of any kind or nature who will, may or might make a claim for a commission or finders fee in connection with this transaction and each party shall indemnify and hold harmless the other from and against any and all liability, responsibility, claims, losses, damages, costs, controversies, expenses and attorneys' fees of any kind or nature incurred or sustained by the other party as a result of the claim of any person or entity for a commission or finders fee resulting from the activities or actions of the party. This paragraph shall survive the Close of Escrow.

6. GENERAL.

6.1 Successor Benefits; No Assignment. This Agreement shall be binding upon and inure to the benefit of the heirs, successors, permitted assigns and legally appointed representatives of the parties hereto except as specifically provided herein to the contrary. Buyer shall not transfer, assign or convey any rights in, to or under this Agreement without Seller's consent in its sole and absolute discretion. The parties acknowledge the reasonableness of this provision because one consideration to Seller for selling the Property at the Purchase Price is the identity of Buyer. Seller shall not transfer, assign or convey any rights in, to or under this Agreement without Buyer's consent, which will not be unreasonably withheld, but provided that Seller may freely assign, as required, to its construction or other lenders. The parties agree and acknowledge that Seller has executed that certain Collateral Assignment of Purchase Agreement in favor of Lender and Buyer has agreed to accept performance by Lender in the place and stead of Seller, as provided in Paragraph 1.6 above (although Lender has no obligations to perform the obligations of Seller). Except for such Collateral Assignment, any further or future assignment by Seller, while the Deed of Trust and Assignment of Rents in favor of Lender remains outstanding, shall require the prior written consent of Lender in its sole discretion.

6.2 Time of Essence. Time shall be considered of the essence for purposes of this Agreement.

6.3 Severability. If any provision in this Agreement or any application thereof shall be invalid or unenforceable, the remainder of this Agreement and any other application of such provision shall not be affected thereby and shall not be rendered invalid or unenforceable.

6.4 Notices. Any notices or demands which shall be required or permitted by law or any of the provisions of this Agreement shall be in writing and shall be effective when delivered personally, or when successfully telecopied (as evidenced by a receipt thereof) provided a confirmation copy is mailed to the addressee, or when sent by United States registered or certified mail, postage paid, and addressed to the parties at the addresses shown below or such other addresses indicated by one party to the other party in writing from time to time:

Seller:

Each Seller Entity
c/o MCW Holdings, L.L.C.
P. O. Box 3065 (Mail)
Tempe, Arizona 85280-3065
602 West First Street (Delivery)
Tempe, Arizona 85281-2606
Telecopy: (480) 966-4100
Attention: William G. Was, Jr. or Theodore F. Claassen

with a copy to:

David W. Kreutzberg, Esq.
SQUIRE, SANDERS & DEMPSEY L.L.P.
Two Renaissance Square
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
Telecopy: (602) 253-8129

Buyer:

City of Tempe
Will Manley
City Manager
City of Tempe
P. O. Box 5002 (Mailing)
Tempe, Arizona 85280
20 East Sixth Street (Delivery)
Tempe, Arizona 85281
Telecopy: (480) 350-8930

with a copy to:

Brad Woodford, Esq.
City Attorney's Office
City of Tempe
140 East Fifth Street, Suite 301
Tempe, Arizona 85281
Telecopy: (480) 350-8645

The inability to deliver because of a changed address of which no notice was given, or rejection or other refusal to accept any notice, shall be deemed to be the receipt of the notice as of the date of such inability to deliver or rejection or refusal to accept. Any notice to be given by any party hereto may be given by the Counsel for such party.

6.5 Inconsistencies. If any term or condition of this Agreement (or any subsequent addenda) is in any way inconsistent with the printed form Escrow Instructions or any other documents that have been or will be prepared in connection with this transaction, then, in such event, the terms and conditions of this Agreement (or any subsequent addenda) shall control.

6.6 Attorneys' Fees. If any action is instituted by either of the parties hereto for the enforcement of any of its rights or remedies in and under this Agreement (if allowed hereunder), the party in whose favor judgment shall be rendered therein shall be entitled to recover from the other party all costs incurred by said prevailing party in said action, including reasonable attorneys' fees fixed by the Court.

6.7 Counterparts; Entire Agreement. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement and the Development Agreement constitute the entire agreement between the parties pertaining to the Property, and it supersedes all prior agreements and understandings of the parties in connection therewith. No oral agreements or understandings between the parties shall be binding upon them. To the extent there is any inconsistency between this Agreement, and the terms of the Development Agreement, this Agreement shall control.

6.8 Amendment and Waiver. The parties hereto may by mutual agreement amend this Agreement in any respect, provided that any such amendment shall be in writing, signed by both parties. Notwithstanding the foregoing, the parties agree and acknowledge that any amendment to this Agreement, while the Deed of Trust and Assignment of Rents in favor of Lender remains outstanding, shall require the prior written consent of Lender in its sole and absolute discretion. The waiver of any condition under these Instructions shall not constitute a future waiver of said condition or any other condition.

6.9 Headings; Construction and Governing Law. The headings of the paragraphs herein are for the convenience of the parties only and shall not affect the meanings or interpretations of the contents thereof. This Agreement is to be performed in the State of Arizona and shall be construed and enforced in accordance with the laws of that State.

6.10 Construction. The parties agree that each party and its counsel have reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement or any amendments or Exhibits hereto.

IN WITNESS WHEREOF, the parties have executed this Addendum to Escrow Instructions to be effective as of the date specified in the printed Escrow Instructions.

SELLER:

MCW TEMPE MILL, L.L.C., an Arizona limited liability company

By MCW Holdings, L.L.C., an Arizona limited liability company
Its Manager

By _____
Its _____

TEMPE MILL PARKING, L.L.C., an Arizona limited liability company

By MCW Holdings, L.L.C., an Arizona limited liability company
Its Manager

By _____
Its _____

TEMPE MILL STREETSCAPE, L.L.C., an Arizona limited liability company

By MCW Holdings, L.L.C., an Arizona limited liability company
Its Manager

By _____
Its _____

ATTEST:

By:_____
City Clerk

APPROVED AS TO FORM:

By:_____
City Attorney

BUYER:

CITY OF TEMPE, a municipal corporation

By:_____
Name:_____
Title:_____

ACCEPTED this ___ day of _____, 2001.

FIDELITY NATIONAL TITLE INSURANCE COMPANY

By: _____
Its Escrow Officer

When recorded, return to:

City of Tempe
31 East Fifth Street
Tempe, Arizona 85281
Attention: City Clerk

SECOND AMENDED AND RESTATED
DEVELOPMENT AND DISPOSITION AGREEMENT
(Hayden Ferry South)
[C01-_____]

THIS SECOND AMENDED AND RESTATED DEVELOPMENT AND DISPOSITION AGREEMENT ("Agreement") is made as of the _____ day of _____, 2001, by and between THE CITY OF TEMPE, an Arizona municipal corporation (the "City"), and MCW TEMPE MILL L.L.C., an Arizona limited liability company (the "Developer").

RECITALS:

A. The City and Bay State/Benton-Robb, L.L.C., an Arizona limited liability company entered, into that Amended and Restated Development and Disposition Agreement dated as of April 30, 1998, and recorded as Instrument No. 98-0617868, Official Records of Maricopa County, Arizona (the "Restated Agreement"), whereby the City and Bay State/Benton-Robb, L.L.C. agreed to undertake coordinated planning of the redevelopment of certain real property located within the City and more particularly described therein. The Restated Agreement was amended pursuant to that First Amendment to Amended and Restated Development and Disposition Agreement dated as of July 7, 1998 and recorded as Instrument No. 98-0650245, Official Records of Maricopa County, Arizona (the "First Amendment"). The Restated Agreement was further amended pursuant to the Second Amendment to the Amended and Restated Development and Disposition Agreement dated as of January 25, 2001, to change the Schedule of Performance (the "Second Amendment"), and was further amended pursuant to the Third Amendment to Amended and Restated Development and Disposition Agreement dated January 25, 2001, (the "Third Amendment") which permitted the assignment of all rights of Bay State/Benton-Robb to MCW Bay State Hayden Mill L.L.C., which rights were subsequently assigned to MCW Tempe Mill L.L.C.. The Restated Agreement, as modified by the First Amendment, the Second Amendment, and the Third Amendment, as assigned to MCW Tempe Mill, L.L.C., is hereinafter referred to as the "Master Development Agreement."

B. Pursuant to the Master Development Agreement the purpose and intent of Developer has been to plan and develop certain portions of the real property that are legally described in **Exhibit "A,"** attached hereto, and incorporated herein by this reference

including all of the property located south of the Rio Salado Parkway (the "Project Property"). Certain portions of the Project Property were the subject of the Approved Preliminary PAD approved by the City on December 18, 1997, under Case #SPD-97.85-Hayden Ferry South (the "Approved Preliminary PAD")

C. On March 31, 2000, the City tendered a Request for Proposals (the "RFP") for the development of the property as identified on **Exhibit "B,"** attached hereto and incorporated herein by reference (the "Remaining Property"). The Developer responded to the RFP and the City selected Developer to redevelop the Remaining Property as part of the Project Property.

NOW THEREFORE, in consideration of the above premises, the promises contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties hereto agree as follows:

AGREEMENT:

ARTICLE I
RESTATEMENT OF MASTER DEVELOPMENT AGREEMENT AND DEVELOPMENT AGREEMENT

This Agreement (a) supercedes and replaces the Master Development Agreement in its entirety with respect to the Project Property described on **Exhibit "A"** attached hereto, and (b) constitutes a development agreement for the Project Property. Hereafter, this Agreement shall be the only development agreement in effect for the Project Property, subject to **Article X** below. This Agreement is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

ARTICLE II
RELINQUISHMENT OF RIGHTS

By entering into this Agreement, Developer relinquishes any rights to acquire and develop the City owned parcel generally lying above the 1180 foot elevation line more particularly described on **Exhibit "A-4,"** attached hereto, and incorporated herein by this reference (the "City Park Property").

ARTICLE III
DEFINITIONS

For purposes of this Agreement, the following terms shall have the meanings set forth below:

3.1 "Approved Preliminary PAD." The term "Approved Preliminary PAD" shall mean and refer to that Preliminary PAD for Hayden Ferry-South, SPD-97.85, approved by the City on December 18, 1997, and any modifications and amendments thereto,

which Preliminary PAD sets forth specific uses, densities, features and other development matters with respect to certain portions of the Project Property.

3.2 "City." The term "City" shall mean and refer to the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

3.3 "City Property." The term "City Property" as used in this Agreement shall mean and refer to that portion of the Project Property that is currently owned by the City and legally described in **Exhibit "A-1,"** attached hereto, and incorporated herein by this reference.

3.4 "Conceptual Plan." Developer's concept plan described on **Exhibit "E"** attached hereto and incorporated herein by this reference that will be refined into final PAD(s) for the Project Property.

3.5 "Developer." The term "Developer" shall mean and refer to MCW Tempe Mill, L.L.C., an Arizona limited liability company, and its successors and assigns.

3.6 "Developer's Property." The term "Developer's Property" shall mean and refer to all of the property that is currently owned or controlled by the Developer and legally described in **Exhibit "A-2,"** attached hereto, and incorporated herein by this reference.

3.7 "Final PAD." The term "Final PAD" shall mean and refer to a Final PAD that is approved by the City with respect to the development of a single Parcel or group of Parcels within the Project Property and that sets forth the specific uses, densities, features and other development matters with respect to such Parcel or Parcels.

3.8 "Hayden Ferry-South Schedule of Performance." The term "Hayden Ferry-South Schedule of Performance" shall mean and refer to that schedule of performance agreed to by the City and the Developer as set forth in **Exhibit "C"** attached hereto and incorporated herein by this reference. The Hayden Ferry South Schedule of Performance supercedes all previous schedules of performance applicable to the Project Property. Notwithstanding the use of or reference to the term "Hayden Ferry-South" to refer to the Project Property and the schedule of performance applicable to the Project Property, such name shall not be deemed to imply that the Project Property must be developed and operated under the name "Hayden Ferry-South," and the parties hereby acknowledge that the Project Property may be developed under any other name deemed to be desirable by Developer.

3.9 "Improvements." The term "Improvements" shall mean and refer to all public and private improvements that may be constructed from time to time on the Project Property, including, without limitation, all structures, buildings, roads, driveways, parking areas, walls, landscaping and other improvements of any type or kind, or any other alteration

of the natural terrain to be built by the Developer or the City, as the case may be, pursuant to the terms of this Agreement.

3.10 "Mortgage." The term "Mortgage" shall mean and refer to a mortgage or deed of trust or other instrument creating an encumbrance or lien upon any portion of the Project Property, or any part thereof, as security for a loan.

3.11 "Mortgagee." The term "Mortgagee" shall mean and refer to the mortgagee or beneficiary under any Mortgage, and shall include any insurer or guarantor of any obligation or condition secured by such Mortgage.

3.12 "Owner." The term "Owner" shall mean and refer to each individual owner or ground lessee of a Parcel within the Property.

3.13 "Parcel." The term "Parcel" shall mean and refer to an individual parcel of real property within the Project Property, whether created as a separate lot by a Final PAD, by lot split or through another means of real property subdivision approved by the City.

3.14 "Park Property." The term "Park Property" shall mean and refer to that parcel of real property within the Property, currently owned by the Developer and generally lying above the 1180 foot elevation line and that will be acquired by the City in accordance with this Agreement and more particularly described in **Exhibit "A-3"** attached hereto and incorporated herein by this reference.

3.15 "Project Property." The term "Project Property" shall mean and refer to the property legally described in **Exhibits "A,"** attached hereto and incorporated by reference.

3.16 "Property." The term "Property" shall mean and refer to all of the property that is legally described in **Exhibits "A," "A-3" and "A-4,"** attached hereto, and incorporated herein by this reference and that consists of the Project Property, the City Property, the Developer's Property, the Park Property, the City Park Property and the Remaining Property.

3.17 "Remaining Property." The term "Remaining Property" shall mean and refer to that portion of the Project Property that is described in **Exhibit "B"** attached hereto and incorporated herein by this reference.

ARTICLE IV
DEVELOPMENT PLAN

4.1 Scope of Development. As of the date of this Agreement, the City has previously approved the Approved Preliminary PAD for a portion of the Property. The City hereby acknowledges that the Developer intends to submit to the City for its approval the

new preliminary PAD (the "Preliminary PAD") and Final PAD for the Project Property. The Preliminary PAD and Final PAD will be based on the Conceptual Development Plan attached hereto as **Exhibit "E,"** and will materially differ from the land uses, intensity and density of uses relative to the aggregate size of buildings, structures and other Improvements to be developed and constructed within the property as set forth on the Approved Preliminary PAD. Once approved by the City, the Preliminary and Final PAD with respect to the Project Property shall refine and shall be deemed to supersede the Conceptual Development Plan and the previously Approved Preliminary PAD with respect to Property. Prior to the approval of a Final PAD with respect to the Project Property, or portions thereof, the Developer and the City shall work together to allow Developer to process and seek approval of the Preliminary PAD and amendments thereto. Developer and the City acknowledge that amendments to the Preliminary PAD and Final PAD may from time to time be necessary to further refine the Preliminary PAD or Final PAD approved with respect to the Project Property to reflect changes in market conditions and/or financing for Improvements. The parties hereto covenant and agree to cooperate with each other in good faith and to use their best efforts to allow Developer to prepare and seek approval of all such amendments to the Conceptual Development Plan and subsequent Preliminary PAD that may be necessary to accomplish the goals intended by this Agreement. In connection therewith, the parties covenant and agree that, during the Developer's preparation and pursuit of approval of any Final PAD or any modifications thereto, each will reasonably consider the economic feasibility of the development of the Project Property and any phases therein, including, without limitation, consideration of marketing parameters, economic feasibility, financing constraints and physical site constraints.

4.1.1 Development Plans. The Project Property shall be developed in general conformance with the Conceptual Development Plan. Within one hundred eighty (180) days following the date of this Agreement, the Developer shall submit to the City a Preliminary PAD for the Project Property, in accordance with normally applicable City submission requirements for such applications. If approved by the City, the Preliminary PAD shall supersede the Conceptual Development Plan. Subsequent to the approval of the Preliminary PAD, the Developer shall seek City approval of any amendments that from time to time may be necessary to further refine the Preliminary PAD to reflect changes in market conditions and project financing. The parties covenant and agree to cooperate with each other and to use best efforts to allow the Developer to process and seek approval of any amendments to the Preliminary PAD that Developer reasonably deems may be necessary to accomplish the goals for the development of the Project Property.

4.2 Schedule of Development. The City and the Developer intend that the planning and development of the Project Property shall continue and be achieved pursuant to the Hayden Ferry-South Schedule of Performance. From time to time following the date of this Agreement, however, the Developer and the City shall reasonably, by mutual written agreement, refine and revise the Hayden Ferry-South Schedule of Performance as may be necessary to accommodate any unforeseeable factors, events or occurrences that necessitate such refinement or revision. All actions required to be taken by the City and the Developer

pursuant to the terms of this Agreement shall be taken in accordance with the Hayden Ferry-South Schedule of Performance in existence at the time when such performance is required.

4.2.1 Failure of Timely Performance. Notwithstanding anything else contained in this Agreement but subject to the provisions as set forth in **Sections 4.2.2** below, if either party hereto fails to perform any of its obligations that are set forth in or contemplated by this Agreement or in the Hayden Ferry-South Schedule of Performance in a timely manner, and if such failure is not otherwise excused by written agreement of the parties or by the terms of this Agreement, such failure shall be considered to be a breach of this Agreement and the nonbreaching party shall have its respective remedies set forth in **Article XI** of this Agreement.

4.2.2 Excused Delay in Performance. In addition to the specific provisions of this Agreement, the performance by either party hereunder shall not be deemed to be a breach where delays or defaults are due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, unusually severe weather, inability (when the party required to perform is faultless) of any contractor, subcontractor or supplier to perform acts for such party due to such events of *force majeure*, litigation relating to the Project Property initiated by a third party other than Developer or the City (and where the party hereto is without fault in connection with such litigation), or any other causes beyond the control or without the fault of the party claiming an extension of time to perform. If one party to this Agreement is unable or fails to perform due to an event constituting *force majeure* as provided above, and such excused delay is the proximate cause of the other party being unable or failing to perform in accordance with the terms of this Agreement, then the time for the performance of the other party shall be extended for a period of time equal to the period of the delay plus a reasonable start-up period. An extension of time for any such cause shall only be for the period of the forced delay, which period shall commence to run from the time of the commencement of the cause.

4.2.3 Phasing of Development. The City hereby acknowledges that the development of the Project Property in accordance with the Conceptual Development Plan, as may be modified by the Developer and approved by the City, contemplates that such development will be phased in accordance with the Preliminary PAD and/or Final PAD and Hayden Ferry South Schedule of Performance.

4.2.4 Certificate of Completion. Promptly after substantial completion of the construction of any Improvements on a Parcel within the Project Property in accordance with the Final PAD approved by the City with respect to such Parcel, the City shall furnish to the Developer or other Owner thereof a certificate of completion ("Certificate of Completion") certifying that the construction of the Improvements has been completed; provided, however, that the Developer or other Owner thereof may request the issuance of a Certificate of Completion prior to substantial completion of such Improvements if the Developer or other Owner thereof presents adequate assurances of completion of the Improvements through bonds or other assurances that substantial completion will be

forthcoming. The City shall not unreasonably withhold its consent to such a request by Developer or any other Owner thereof. The satisfaction of conditions for issuance of a certificate of occupancy with respect to any such Improvements shall be conclusive evidence of the Developer's or other Owner's satisfaction of the requirements for issuance of a Certificate of Completion. Within fifteen (15) days after request for issuance of a Certificate of Completion, the City shall act upon the Developer's or other Owner's request. Upon issuance of the Certificate of Completion, the Developer or other Owner, as the case may be, may record the Certificate of Completion in the Office of the Maricopa County Recorder. In the event that the City refuses or fails to provide the Certificate of Completion, the City shall, within fifteen (15) days after written request by the Developer or other Owner for such certification, provide the Developer or other Owner with a written statement indicating in adequate detail why the Certificate of Completion was not issued by the City and what measures or acts the City requires before the City will issue the Certificate of Completion. In addition to all Certificates of Completion, the City shall also execute and deliver a quit-claim deed and/or any other documents reasonably required by a title insurance company to issue clear, unencumbered title insurance free of any City lien or other City encumbrance asserted under this Agreement with respect to any Parcels within the Project Property to the extent such Parcels are no longer subject to obligations contained in this Agreement.

4.3 Expedited Approvals. The City hereby acknowledges and agrees that development of the Project Property in accordance with the Conceptual Development Plan, as may be further modified by the Preliminary PAD, will, as a result of unusual site conditions, the size of the Project Property, market conditions and other economic factors, occur over a span of a number of years and will require the City's ongoing participation in the review and approval of modifications and amendments to the Preliminary PAD, Final PAD, site plans, infrastructure plans, drainage plans, design plans, building plans, grading permits, building permits, archaeological and historic preservation review and disposition, and other plans, permit applications and inspections that are a part of the City's current building and development requirements (hereinafter collectively called "Approval Requests"). The City hereby agrees that, in connection with all such Approval Requests relating to the development of any Parcel within the Project Property and the construction of any Improvements, the City will accelerate its review and response to all such Approval Requests in accordance with the City's accelerated review policy. The City further agrees that no unusual or extraordinary plan or review requirements, conditions or stipulations will be imposed on Developer or any other Owner of any Parcel within the Project Property. To ensure the City's expeditious response to any and all Approval Requests by the Developer, the City hereby agrees to designate a representative of the City to act as a liaison between the City and the Developer and between the City's various internal departments and the Developer. Such liaison shall be at Developer's expense if the City is required to retain a non-City staff person to act as such liaison. Such representative shall be available at all reasonable times to serve as such liaison, it being the intention of this Section to provide Developer with one individual as the City's principal representative with respect to the Project Property. The Developer shall also designate a representative who shall serve as a liaison between the Project Property and the City. The initial representative for the City shall

be the City Redevelopment Director, and the initial representative for the Developer shall be Theodore Claassen.

ARTICLE V
ACQUISITION AND CONVEYANCES OF PROPERTY

5.1 City Purchase of Public Amenities. Simultaneously with the execution of this Agreement, the City and the Developer will enter into a Noncontingent Agreement of Purchase and Sale (the "Purchase Agreement") for the City's purchase of the following public amenities (collectively, the "Public Amenities"):

A. The Park Property as identified herein (**Exhibit "A-3"**)
B. Public parking spaces to be constructed as identified on the Conceptual Plans ("Public Parking Spaces") to be available to the general public and not specifically reserved for City use.
C. Streetscape Improvements to Rio Salado Parkway and Mill Avenue as identified herein (**Exhibit "D"**) and Transit Right-of-Way as identified herein (**Exhibit "G"**).

The parties agree that the purchase price for the Public Amenities shall be Eleven Million Eight Hundred Fifty Thousand and 00/100 Dollars ($11,850,000), and the Purchase is subject to the terms and conditions stated in the Purchase Agreement. The Purchase Agreement shall contain a closing date on or before July 15, 2003.

5.1.1 Improvement District. The City shall use its best efforts to form the District described in **Section 7.3** to include all of the Project Property, to assess against the Project Property the costs of the acquisition, construction and financing of the Public Amenities and such other public improvements as the parties may agree to as may be permitted by law and to issue improvement bonds secured by such assessments to finance such acquisition and construction. The Developer shall cooperate in the formation of the District and shall enter into such additional development agreements and waiver agreements as may be approved by the City and the Developer to facilitate the formation of the District, the levy of the assessments, the issuance and sale of the bonds and the timely payment of the bonds. Payments of the assessment installments by the Developer for payment of the District bonds shall be offset by City sales taxes generated on the Project Property pursuant to **Section 7.2** of this Agreement.

5.1.2 Contingent Purchase of Developer's Property. If for any reason, the improvement district bonds are not issued and sold and the funds received therefor in an amount sufficient to pay the costs of purchasing the Public Amenities and such other improvements as agreed to by the parties prior to July 15, 2003, Developer shall sell and City shall purchase all of Developer's Property and development rights as provided in the Purchase Agreement of even date, free and clear of any of Developer's liens, for the purchase price of Eleven Million Eight Hundred Fifty Thousand and 00/100 Dollars

($11,850,000). To the extent there is any inconsistency between this provision and the terms of the Purchase Agreement, the terms of the Purchase Agreement shall control.

5.2 Acquisition of Property. As of the date of this Agreement, the Developer does not own fee title to the Remaining Property. If Developer cannot purchase the Remaining Property at a commercially feasible rate, the City shall use its powers of Eminent Domain to assemble the Remaining Property.

5.2.1 Funding for Acquisition. Funding necessary for the acquisition of the Remaining Property, including relocation expenses as described below, shall be provided by the Developer. The foregoing provisions shall not preclude the City's participation in purchases, as the City may agree in its sole and absolute discretion. The parties further agree that the terms and conditions of the financing of the acquisition of the Remaining Property and acquisition costs of the Remaining Property shall require the City's approval, which shall not to be unreasonably withheld.

5.2.2 Parking Relocation . Developer shall bear the responsibility and obligation for relocation of existing parking on the Remaining Property during the period of construction on the Remaining Property. City agrees that, if Developer is unable to secure the relocation parking sites, the City will use its powers of eminent domain to secure the needed relocation parking sites at Developer's expense.

5.3 Conveyances of Parcels of City Property to Developer. The City shall continue to hold fee title to all of the City Property until such time as Developer requests the conveyance of any Parcel therein. At such time as the Developer desires to acquire any Parcel of City Property, and as long as Developer is not then in breach under this Agreement after the expiration of any applicable notice and cure periods, Developer shall deliver a written notice to the City, which notice shall indicate (a) the legal description of the Parcel of the City Property to be conveyed to Developer, and (b) the date by which the closing of the conveyance of such Parcel is desired by Developer. The City and the Developer shall thereupon enter into an escrow with a third party escrow agent mutually acceptable to the City and Developer ("Escrow Agent"), who shall hold all documents, receive all monies and perform such other acts as are normal and customary for a commercial escrow agent in similar transactions. The following additional terms and conditions shall apply with respect to the conveyance of any Parcel of the City Property to Developer:

5.3.1 Legal Description. The legal description of the Parcel of City Property to be conveyed to Developer shall be determined by the Developer and the City in accordance with an ALTA survey (the "Survey") prepared by a civil engineer licensed in the State of Arizona and mutually and reasonably acceptable to the City and Developer. The cost of the Survey of the Parcel shall be paid by Developer.

5.3.2 Form of Deed. Fee simple title to any Parcel conveyed by the City to the Developer shall be conveyed pursuant to special warranty deed executed by the

City, free and clear of any City liens and other City encumbrances asserted under this Agreement, except for any continuing obligations encumbering the Parcel pursuant to the District as set forth herein, and the Permitted Exceptions approved by Developer in accordance with the provisions set forth in **Section 5.3.3** below.

5.3.3 Title Insurance. Fee simple title to all Parcels of the City Property conveyed by the City to the Developer shall be insured pursuant to an ALTA extended coverage owner's policy of title insurance issued by the Escrow Agent, together with such endorsements as may be requested by the Developer. The title policy shall be subject only to those liens and encumbrances and other exceptions approved by Developer as hereinafter set forth. Within fifteen (15) days after receipt of Developer's notice that it desires to acquire a particular Parcel within the City Property the City shall cause Escrow Agent to issue a preliminary title commitment incident to the issuance of an ALTA extended coverage title insurance policy with respect thereto, together with legible copies of all matters indicated in Schedule "B" thereof (the "Title Commitment"). The Developer shall thereafter have a period of fifteen (15) days to review and object to any matter indicated in the Title Commitment (except for any continuing obligations encumbering such Parcel pursuant to the District as set forth herein, or other districts as may already have been established and to which the Project Property is subject), and any matters indicated on the Survey that would unreasonably interfere with or otherwise adversely affect Developer's development of such Parcel. Within ten (10) days after receipt of Developer's objections to the Title Commitment and/or the Survey, the City shall provide written notice to Developer of the City's election to either (a) attempt to cure any such objections, either by causing the matter objected to to be removed of record or by causing the title company to agree to endorse over the matter on its title policy pursuant to an endorsement acceptable to Developer, or (b) not to attempt to cure such objection. The failure of the City to notify the Developer of the City's intention within said 10-day period shall be deemed an election by the City not to attempt to cure the objection. If the City elects to attempt to cure a title or Survey objection, it shall have a period of until ten (10) days prior to the scheduled date for the closing of the conveyance of the Parcel to attempt to cure the objection. If the City elects or is deemed to have elected not to attempt to cure any title or Survey objection by Developer, or if the City elects to attempt to cure a title or Survey objection but fails to cure such objection within the period set forth above, then the Developer may either (i) cancel its election to purchase the Parcel by written notice delivered to the City, (ii) give the City additional time to eliminate or cure the Developer's objection while reserving the Developer's rights under **Sections (i) and (iii)** of this paragraph, or (iii) waive the objection and proceed to close the acquisition of such portion of the City Property. Notwithstanding anything contained in the foregoing to the contrary, to the extent that any title or Survey objections made by Developer relate to monetary liens or encumbrances created or caused by the City after the date of the execution of this Agreement (except as to those permitted by this agreement), then, in that event, the City shall have an affirmative obligation to cause such liens and encumbrances to be paid and/or removed as title exceptions as of the tenth (10th) day prior to the scheduled date for closing. If the City fails to cause such liens and encumbrances to be paid or removed, then, in that event, in addition to all other rights and remedies available to Developer under this Agreement, Developer shall have the right to take

such action(s) as may be necessary to cause such liens and encumbrances to be removed or to cause the Escrow Agent to issue an endorsement over such matters, in which event the costs incurred by Developer in connection therewith shall be reimbursable by the City. With respect to all other title matters created by the City after the date of this Agreement, the City shall obtain Developer's prior written consent before causing all such other matters to be recorded against the City Property. All matters not objected to by Developer in accordance with the provisions hereof, or which are objected to by Developer but with respect to which Developer thereafter waives such objection, shall be deemed to be "Permitted Exceptions." The City shall pay the standard coverage portion of the title insurance policy to be issued to Developer and the Developer shall pay the additional premium required to be paid with respect to extended coverage, together with any additional premiums required to be paid for any endorsements requested by Developer (except for any endorsements required to cure any title or survey objections made by Developer that the City elected not to cure, which premiums shall be reimbursable by the City).

5.3.4 Prorations. All real property taxes and assessments shall be prorated between the City and Developer as of the date of closing of the conveyance of any Parcel of the City Property to Developer, based upon the latest available information.

5.3.5 Closing Date. The closing of the conveyance of any Parcel of City Property and/or Remaining Property to Developer shall occur on the date set forth in Developer's notice to the City provided pursuant to the provisions of **Section 5.3** above or such other date and time mutually agreed to by the City and the Developer in writing.

5.3.6 Condition of Property. The City shall deliver Parcels within the City Property to Developer in an "as is," "where is" condition.

5.4 Maintenance of City Property Inspections; Temporary Construction Easements. Prior to the conveyance of any Parcel of the City Property to Developer pursuant to the terms of this Agreement, the City shall bear all costs of maintenance and ownership of such Parcel; provided, however, that the City shall permit Developer, its employees, agents, contractors and designees, access to all of the City Property at no cost, fee or charge to permit Developer and such other parties to inspect, test, analyze and survey the City Property in furtherance of the planning and development of the Project Property as contemplated by this Agreement and the Conceptual Development Plan; and provided, further, that the City shall, upon written request of Developer, at no additional cost or charge, provide to Developer or any other Owner reasonable temporary easements for construction. Developer shall maintain and restore any portions of the City Property with respect to which the City has conveyed any such temporary easements at its sole cost and expense.

5.5 Encumbrances Upon Property.

5.5.1 Limitations on Right to Encumber The Property. For as long as the Purchase Agreement described in **Section 5.1.2** is in effect, neither Developer nor any

successor in interest to the Developer shall create any Mortgage or other monetary encumbrance or lien upon the City Property or the Developer's Property, whether by express agreement or operation of law, or suffer any monetary encumbrance or lien to be made on or attached to the City Property or the Developer's Property without the prior written consent of the City, which consent shall not be unreasonably withheld, unless either (a) the total amount of the encumbrance, inclusive of interest accruing until the Required Closing Date under the Purchase Agreement, and all other encumbrances will not exceed the Purchase Price of $11,850,000 under the Purchase Agreement, or (b) the Mortgagee(s) or other encumbrance holder(s) are unconditionally obligated to release the Mortgage(s) or other encumbrance(s) at the Closing under the Purchase Agreement for a total release price payment not exceeding $11,850,000. If any Mortgagee of Developer requests confirmation that any proposed lien is authorized by this Agreement, the Mayor of the City, the City Manager or the Assistant City Manager shall each immediately be authorized, and is hereby authorized by the City, and shall be obligated to immediately provide such written consent as may be required by such Mortgagee.

5.5.2 Delivery of Notice. Until issuance of a Certificate of Completion, the Developer shall be obligated to notify the City in writing in advance of (a) any financing secured by a Mortgage or other similar lien instrument that it proposes to enter into with respect to any Parcel within the Developer's Property and (b) any encumbrance or lien that has been created on or attached to the Developer's Property whether by voluntary act of the Developer or otherwise. The notice shall set forth the name and address of the proposed Mortgagee or other benefited party.

5.5.3 Copy of Notice of Breach to Mortgagee. Whenever the City delivers any notice or demand to the Developer with respect to any breach by the Developer in its obligations or covenants under this Agreement, the City shall, at the same time, forward a copy of such notice or demand to each Mortgagee permitted under the terms of this Agreement at the last address of such Mortgagee set forth in the latest notice delivered to the City. Failure to deliver such notice shall make the notice invalid for all purposes until such copy is delivered to each Mortgagee.

5.5.4 Mortgagee Not Obligated to Construct. No Mortgagee, including any Mortgagee who obtains title to any portion of the Project Property, or any part thereof, as a result of foreclosure proceedings or action in lieu thereof, shall be contractually obligated by the provisions of this Agreement to construct or complete the construction of any Improvements or to guarantee such construction or completion; nor shall any covenant or any other provisions of this Agreement be construed so as to obligate such Mortgagee.

5.5.5 Mortgagee's Option to Cure Defaults. Notwithstanding the provisions of **Section 5.5.4** above, after any breach or default under this Agreement, each Mortgagee shall have the right, but not the obligation, to cure or remedy any breach or default under this Agreement (or such breach or default to the extent that it relates to the portion of the Project Property covered by the Mortgage) within the same period of time to cure that is provided to the Developer hereunder following receipt of notice by such

Mortgagee, except that if any such Mortgagee must take any judicial or nonjudicial foreclosure action or other proceeding to effect any such cure or remedy, then such Mortgagee shall have such additional period of time to cure or remedy a default as may be necessary to permit Mortgagee to complete such foreclosure or other legal proceeding, including, without limitation, resuming or recommencing the construction of any Improvements permitted under this Agreement to complete said Improvements and to add the cost thereof to the Mortgage debt and the lien of its Mortgage. If any Mortgagee cures any default or breach hereunder, the City shall accept such performance by Mortgagee to the same extent as if the same had been made by the Developer and shall thereupon rescind the notice of default. Any Mortgagee that properly completes any Improvements within the Project Property pursuant to the terms of this Agreement shall be entitled, upon written request made to the City, to a Certificate of Completion issued by the City as, if and to the extent such performance were rendered by Developer. Any such Certificate of Completion shall have the same effect as if it had been delivered to Developer and shall mean and provide that any rights or remedies that the City has with respect to the Project Property covered by the Certificate of Completion due to a default by Developer or a successor-in-interest to Developer, or that the City shall have or have been entitled to due to the failure of the Developer or any successor-in-interest to cure or remedy any default, shall not apply to the Parcel as to which such Certificate of Completion relates. If Developer or any Mortgagee disputes whether a default has occurred, such dispute shall be subject to mediation as provided for in **Section 14.2** of this Agreement.

ARTICLE VI
RIO SALADO PARKWAY AND MILL AVENUE

6.1 Utilities in Right-of-Ways. The City hereby agrees that development of the Project Property by Developer in accordance with the Conceptual Development Plan, as may be further modified pursuant to this Agreement, will involve the construction and installation of site-related water, sewer, electrical, cable, telephone, gas and other utility distribution lines, conduits and structures, in addition to public utilities constructed and installed by the City. In connection therewith, the City hereby agrees that it shall permit Developer and its assigns from time to time to utilize the public right-of-way within the Rio Salado Parkway and Mill Avenue in connection with the construction of Improvements within the Project Property, including, without limitation, for the purpose of the installation and maintenance of all site-related utility lines necessary or desirable in connection with the development and uses within the Project Property, subject to the City's normal practices and procedures for the review and approval of all utility plans and specifications to be constructed or installed within the Rio Salado Parkway or Mill Avenue right-of-ways and the satisfaction of all conditions and requirements that may be applicable thereto or otherwise required by the City in connection with such use.

6.2 Building, Construction and Occupancy Easement. (a) Subject to all terms, covenants and conditions of this Agreement, City hereby agrees to convey to Developer an easement across and over the real property specifically described in **Exhibit "F,"** attached hereto ("Building Construction and Occupancy Easement"). The purpose of

the easement is to permit the construction, occupancy, operation, maintenance and use of this area for outdoor dining associated with indoor restaurants located in buildings constructed adjacent to this easement area, per plans as they may be approved by the City of Tempe, construction of new and relocation of existing utilities that service the building or adjacent properties and to allow portions of the buildings to project into the right-of-way in accordance with the Final PAD as it may be approved by the City .

(a) The granting of said easement will be subject to the prior rights of all existing easements or rights of possession, as well as the unencumbered right of the public to use the property for ingress, egress, utilities or any other public purpose that does not endanger or jeopardize the construction, operation, occupancy, maintenance and use of the easement for outdoor dining purposes.

(b) After construction of the adjacent buildings, if for any reason the buildings are abandoned, removed or destroyed and within a period of twenty-four (24) months not be rebuilt and reoccupied, then, at the City's sole and absolute discretion, said easement may be declared null and void and all rights conveyed by said easement shall revert to the City.

(c) During the effective term of this easement, Developer and it's successors and assigns, at it's own expense shall maintain in full force a policy or policies of comprehensive liability insurance, including property damage, written by one or more responsible insurance companies licensed to do business in Arizona and that shall insure Developer and the City against liability for injury to persons and property and for the death of any person occurring in, on or about the easement.

The limits of such insurance shall not be less than $2,000,000 for the death or injury of any one person, nor less than $5,000,000 for any one accident, nor less than $2,000,000 for property damage. Said insurance limits shall be periodically adjusted to maintain limits equivalent to these initial limits throughout the effective term of the easement. Said insurance shall be primary to the City's self-insurance.

(d) Developer shall provide City with duplicates of insurance policies maintained by Developer pursuant to this Agreement, or certificates of insurance relating thereto issued by the insurers. If Developer fails to maintain or renew any insurance policy required under this Agreement, or to pay the premiums therefore, City and/or any Mortgagee of the adjacent Buildings may, with thirty (30) day written notice to Developer, at their respective options but without obligation to do so, procure such insurance or pay such premiums, and any sums expended therefore shall be repaid by Developer to the party expending the same upon demand, together with interest thereon at the rate of

two percent (2%) above the "prime interest rate" charged by Bank One, or its successor, at the date of the payment until repaid by Developer.

Developer shall obtain the agreement of each insurance company in which a policy required by this Agreement is carried that such policy shall not be cancelled or terminated without thirty (30) days prior written notice to the City and to the mortgagee of any mortgage covering the adjacent building.

(e) City shall execute, separate from this Agreement, a document creating the above stated easement for recording purposes. Said document shall contain all the above stated provisions relating to the easement and such other provisions required by the City of Tempe and agreeable to both parties to this Agreement. Said document shall be executed and recorded, upon request of Developer, prior to the issuance of building permits for the construction of any building or improvement of the easement property in accordance with the approved plans.

ARTICLE VII
TAX ABATEMENT, SALES TAX REBATE AND IMPROVEMENT DISTRICT FINANCE

7.1 Tax Abatement. The City and Developer hereby acknowledge and agree that, because of the additional and extraordinary costs associated with the inclusion of the Project Property within the Park and Parking Improvement District, the increased costs of the development of off-site and on-site infrastructure Improvements resulting from the physical constraints associated with the development of the Project Property and the cost associated with the historic preservation and reuse of the Hayden Flour Mill, development of the Project Property is economically feasible only by the commitment and obligation of the City to provide Developer, its successors and other Owners of Parcels within the Project Property, with the benefit of all statutorily-authorized property tax abatements, including, without limitation, all such abatements currently available pursuant to the provisions of A.R.S. §42-6201 through §42-6209. In connection therewith, the City hereby agrees to accept, from time to time, reconveyances of land and conveyances of Improvements and to lease-back all such land and Improvements to the person or entity making such request and referencing the provisions of this **Section 7.1** upon the terms and conditions set forth in a lease to be agreed to by the parties (the "Improvements Lease") for a period of eight (8) years following the issuance of the first certificate of occupancy with respect to any Improvements constructed on a Parcel. The parties hereby acknowledge that each Improvements Lease is intended to be a "Government Property Lease," as defined and contemplated by the provisions of A.R.S. §42-6201, et seq., and shall contain all provisions required thereby, in addition to all other terms and conditions set forth therein. As more particularly set forth therein, each Improvements Lease, as it shall apply to any Improvements, shall (a) be for a term of eight (8) years, commencing with the date the Improvements that are the subject of the Improvements Lease are conveyed to the City by

the Owner thereof, (b) provide for an annual rental payment equal to $50,000 per year prorated among the Improvements Leases, which exceeds the current taxes imposed by the local school districts, and (c) restrict the uses of the Parcel subject to the Improvements Lease to the uses permitted by the Conceptual Development Plan for the Project Property; provided, however, that the Owner of such Improvements shall have the right to make alterations or modifications thereto from time to time as determined to be necessary or desirable in the reasonable discretion of such Owner. Upon the expiration or termination of any such Improvements Lease, the Improvements and the real property upon which such Improvements are situated that are subject to the Improvements Lease shall be immediately reconveyed by quit-claim deed by the City to the appropriate parties as their interests may appear.

7.1.1 Successor or Replacement Tax Abatement Programs. The City acknowledges that development of the Project Property is considered economically feasible only as a result of the availability of the tax abatement incentives provided by currently available tax abatement programs. If for any reason, any such programs are amended, modified, repealed or rescinded such that the full benefits thereof as currently provided on the date of the execution of this Agreement are no longer in effect, then, in that event, the City will use best efforts to provide alternative development incentives and to cooperate with Developer and other Owners of Parcels within the Project Property with respect to any other available tax abatement programs provided by Arizona law or otherwise in order to obtain essentially the same economic benefits for the Project Property as those currently provided by A.R.S. §42-6209.

7.2 Sales Tax Dedication. The City and Developer hereby acknowledge and agree that, because of the additional and extraordinary costs associated with the inclusion of the Project Property within the Park and Parking Improvement District, the increased costs of the development of off-site and on-site infrastructure Improvements resulting from the physical constraints associated with the development of the Project Property and the cost associated with the historic preservation and reuse of the Hayden Flour Mill, development of the Project Property is economically feasible only by the commitment and obligation of the City to provide Developer, its successors and other Owners of Parcels within the Project Property, with the benefit of sales tax rebate. The City will dedicate eighty percent (80%) of the annual City sales tax generated on site by the project, beginning twelve (12) months after the date of issuance of the certificate of completion for the commercial buildings constructed on the Project Property to payment of improvement district costs. The total amount to be dedicated shall not exceed the costs of the Public Amenities of Eleven Million Eight Hundred Fifty and 00/100 Dollars ($11,850,000) together with interest thereon but such amount shall be reduced by the amount of benefits to Developer pursuant to **Section 7.1** herein for City real property taxes that would otherwise be levied against the Project Property.

7.3 Improvement District. Both parties agree to the City's use of an improvement district (the "District"), using tax exempt bonds, to finance the purchase of the Public Amenities, and such other public improvements as the parties agree and will design,

approve and execute the documents necessary to the creation of the District and the issuance and sale of the bonds.

The parties further agree, that the parties will enter into a Parking Management Agreement (the "Parking Agreement"), prior to the creation of the District, by which the City will manage the use and lease of public parking permits, on a month-to-month, non-exclusive right and non-designated basis in the public portion of the parking structure constructed by the District. The Developer shall have no preference in the purchase of any available permits for City owned space while the District financing is in place. The Parking Agreement will also provide for a maximum number of City owned parking spaces, which could be leased by the Developer. The required parking for the Project Property will be calculated by the use of the City's shared parking model, as such model may be modified prior to Final PAD approval, for greater provision for public transit and for general "civic need" parking. The Parking Agreement will include a future option provision that allows for longer-term lease use of the public parking spaces, by the Developer, after the payoff of the bond financing for the District.

The parties further agree, that the City's prorata share of debt service for the District which shall be assessed to the Project Property under **Section 5.1.1** shall be paid from dedicated sales tax proceeds of a portion of the on site sales taxes generated by the Project Property as described in **Section 7.2** above.

7.4 Parking Structure Permit Lease Revenue. The City and Developer hereby agree to consider the use of the District to finance the non-reserved parking portion of the Developer's required on-site parking. If this District is used to finance this portion of the required parking, then the parties also agree to consider the rebate of a prorata portion of the month-to-month lease parking permit and other revenues to be used to off-set a portion of the debt service requirements of the District. The parties agree to use best efforts in the consideration of the provisions of this **Section 7.4**, but also agree that the City is under no obligation to provide District financing or the associated rebate of parking permit revenues toward the construction of the Developer required parking.

ARTICLE VIII
HAYDEN BUTTE

8.1 Public Use and Recreational Easements. The City and Developer hereby agree that public use easements for public rights-of-access to Hayden Butte will be needed upon completion of the Improvements for recreational and City service purposes. The Developer hereby agrees that it will act in good faith in connection with any such request by the City and in connection with identifying and locating appropriate recreational and City service easements that do not unreasonably interfere or impede development of the Project Property or the use, maintenance and operation of any Improvements constructed thereon from time to time, taking into consideration requirements necessary to maintain safe conditions for all Owners and occupants of all Parcels within the Project Property. In connection therewith, to the extent that any recreational and City service easements are made

available to the City for general and certain specific public access, such use shall be subject to written rules and regulations promulgated by the Owner(s) affected thereby, which may be amended from time to time.

ARTICLE IX
PUBLIC TRANSIT

9.1 Public Transit. The Developer hereby agrees that it shall support the development and implementation of public transit facilities as such facilities may be desired by the City within the Project Property to serve the needs of the general public, and that, subject to the infrastructure needs and requirements of the Improvements to be constructed within the Project Property as contemplated by the Conceptual Development Plan, Developer shall cooperate in good faith with the City in connection with the location of any public transit facilities and public rights of way within the Project Property and the integration of such facilities and rights of way with Improvements constructed or planned to be constructed thereon; provided, however, that the City shall be responsible for all additional architectural, engineering, construction and maintenance costs that may be incurred by Developer or any other Owner and resulting from structural or operational upgrades, betterments or other improvements that may be required to be made to any Improvements from time to time constructed or existing within the Project Property to ameliorate the effect or impact of public transit facilities on such Improvements. In connection with its support of public transit facilities within the Project Property, if required by the City, and as long as the City (a) has obtained or otherwise secured the availability of sufficient funding for the implementation of such public transit facilities and has provided written assurances to the Developer of such funding not later than June 30, 2004, and (b) has provided Developer with a written commitment by that date that the City intends to locate public transit facilities on the Project Property in the location hereinafter described, then any Final PADs that are proposed by the Developer and approved by the City for any Parcel adjacent to the Third Street Right-of-way as extended east of Mill Avenue shall include an easement for transit facilities as provided in **Section 5.1(c)** and **Exhibit "G"**, If, as of June 30, 2004, the City has not secured all necessary funding or provided written assurances to the Developer that sufficient funding is or will be available to the City for the implementation of the public transit facilities, or committed to the location of such facilities as contemplated herein, then the Developer shall have no obligation to incorporate the public transit easement described herein on any Final PAD submitted with respect to any Parcel within the Project Property. If (a) and (b) are not timely satisfied, the easement stated herein shall be abandoned.

ARTICLE X
SUBAGREEMENTS

10.1 Subordinate Development Agreements. The City and Developer hereby acknowledge that the development of the Project Property in accordance with the Conceptual Development Plan will involve and may be accomplished by Developer through a series of sales, leases, joint ventures and/or other agreements and arrangements with other experienced developers, investors and Owners of real property. In connection therewith, it is

anticipated and contemplated by the parties that such developers, investors or Owners may desire to negotiate and enter into separate and subordinate development agreements with the City and/or Developer with respect to infrastructure Improvements, uses, plan approvals and other similar matters that may be the subject of separate agreements between such developers, investors and Owners and the City and/or Developer. The parties hereby agree that any and all development agreements entered into with any such developer, investor or Owner of any Parcels of the Project Property shall be subordinate in all respects to the terms and conditions of this Agreement and, in the event of any conflict or discrepancy between the provisions of any such development agreement and the terms and conditions of this Agreement, this Agreement shall govern and control.

ARTICLE XI
DEFAULT; REMEDIES

11.1 Events Constituting Default. A party hereunder shall be deemed to be in default under this Agreement if such party breaches any obligation required to be performed by the respective party hereunder within any time period required for such performance, including, without limitation, any failure to comply with the Hayden Ferry-South Schedule of Performance, as said time periods may be extended for reasons of *force majeure* or as a result of the failure of the other party to this Agreement to act in a timely manner as may be required, and such breach continues for a period of one hundred eighty (180) days after written notice thereof from the non-defaulting party or, if the breach cannot reasonably be cured within one hundred eighty (180) days, then the party shall be in default if it fails to commence the cure of such breach and diligently pursue the same to completion; provided, however, that said 180-day period may be extended for reasons of *force majeure* or for the period of time that the other party hereto has failed to perform any obligation as and when required as otherwise set forth in this Agreement.

11.2 Developer's Remedies. If the City is in default under this Agreement and fails to cure any such default within the time period required therefor as set forth in **Section 11.1** above (except with respect to the City's obligations to respond to any approval requests within the specific periods of time as described in **Section 3.3** above with respect to which the City's cure period shall be five (5) days after receipt of written notice from the Developer), then, in that event, in addition to all other legal and equitable remedies which the Developer may have, including, without limitation, the right to specific performance, the right to seek and obtain damages and the right to self-help, the Developer may terminate this Agreement upon written notice delivered to the City; provided, however, that any such termination shall not affect, and this Agreement shall continue in full force and effect with respect to, those Parcels within the Project Property that have been acquired by Developer and/or upon which Improvements have been constructed or that are in the process of being constructed.

11.3 City's Remedies; Right to Repurchase. In the event that Developer is in default under this Agreement including but not limited to its failure to develop the Project Property in accordance with the Hayden Ferry-South Schedule of Performance, and such

Hayden Ferry-South Schedule of Performance has not been suspended, tolled, modified or extended for reasons of *force majeure*, or as a result of the failure of the City to act in a timely manner with respect to any of its obligations as provided in this Agreement, and Developer thereafter fails to cure any such default within the time period described in **Section 11.1** above, then the City shall have the right to seek all remedies to which it is entitled in law or equity and to terminate this Agreement immediately upon written notice to Developer and, if it so elects, to repurchase any Parcel within the City Property with respect to which Parcel (a) Developer or any other Owner is in default under the Hayden Ferry-South Schedule of Performance, and (b) no building permit has been issued for the construction of building Improvements on the Parcel in accordance with the Final PAD approved therefor, subject to satisfaction of the following conditions:

(i) The City shall have delivered written notice of default to the Developer and the Owner of such Parcel, if other than Developer, and all other parties required to receive such notices of default, specifying the nature of the default and the actions that must be taken to cure said default; and

(ii) A default or delay in performance or approvals required by the City that singularly are not defaults but in the aggregate constitute a default by the City under the terms of this Agreement shall not have been the proximate cause of the default by the Developer or the Owner of the Parcel, if other than Developer.

At such time as a building permit for the construction of the building improvements on a Parcel in accordance with the Final PAD approved therefor has been issued with respect to such Parcel, the City's right to repurchase such Parcel pursuant to the terms of this **Section 11.3** shall automatically terminate and be of no further force or effect. In addition, notwithstanding anything contained in this **Section 11.3** or elsewhere in this Agreement to the contrary, no portion of the Developer's Project Property shall be subject to the City's right of repurchase contained herein.

11.3.1 Repurchase Price. If the City elects to repurchase a Parcel or Parcels that are subject to repurchase as provided herein for its own use or for the purpose of conveying such Parcel or Parcels to a third party, then the City shall pay to the Developer the entire purchase price paid by Developer to City therefor pursuant to the provisions of **Article IV** above; provided, however, that the City shall have the right to claim and offset against such purchase price any cost or expense incurred by the City in curing any default that may have been committed by Developer on such Parcel or Parcels.

11.3.2 Failure To Elect To Repurchase. Notwithstanding anything contained in this **Section 11.3** to the contrary, if the City elects not to repurchase any Parcel within the City Property as a result of a default by Developer as described in the foregoing, or fails to make an election within one hundred eighty (180) days after the cure period with respect to such default has expired without cure being effected, then, in that event, such Parcel shall not be subject to the repurchase rights of the City and the City shall execute and deliver to Developer or other Owner, as the case may be, a quit-claim deed or other

document reasonably required to clear title to such Parcel with respect to such repurchase right.

ARTICLE XII
CONFLICT OF INTEREST; REPRESENTATIVES NOT INDIVIDUALLY LIABLE

12.1 **Conflict of Interest**. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement that affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested.

12.2 **No Personal Liability**. No member, official or employee of the City shall be personally liable to Developer, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount that may become due to the Developer or its successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

ARTICLE XIII
NOTICES

13.1 Unless otherwise specifically provided herein, all notices, demands or other communications given herein shall be in writing and shall be deemed to have been duly delivered upon personal delivery or expedited courier services or as of deposit in the United States Mail, postage prepaid, registered or certified, return receipt requested, addressed at the addresses set forth below or at such other address as the parties may specify by written notice delivered in like manner, and shall be deemed received by the addressee upon the earlier of (a) actual receipt, whether by personal delivery or expedited courier service, or (b) two (2) days after mailing of the notice in the manner provided herein.

To Developer:	MCW TEMPE MILL L.L.C. c/o MCW Holdings, Inc. 602 W. 1st Street Tempe, Arizona 85281 Attention: Theodore Claassen
With copies to:	David Kreutzberg, Esq. Squire Sanders & Dempsey 40 North Central Avenue, Suite 2700 Phoenix, AZ 85004

To the City: City Manager
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281

With a copy to: City Attorney
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281

Either party hereto shall have the right to change its designated notice address by providing to the other party written notice of such change in the manner described above.

ARTICLE XIV
GENERAL PROVISIONS

14.1 Cooperation. The City and Developer hereby acknowledge and agree that they shall cooperate in good faith with each other and use best efforts to pursue the economic development of the Project Property as contemplated by this Agreement.

14.2 Dispute Resolution. If there is a dispute hereunder that the parties cannot resolve between themselves, the parties agree that there shall be a ninety (90) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The matter in dispute shall be submitted to a mediator mutually selected by Developer and the City. If the parties cannot agree upon the selection of a mediator within ten (10) days, then within five (5) days thereafter, the City and the Developer shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and Developer, or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation upon the conclusion of mediation or ninety (90) days after the date the parties first reached an impasse on the subject matter of the dispute, whichever occurs later.

14.3 Captions. The captions used herein are for convenience only and not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

14.4 Estoppel Certificates. Within fifteen (15) days after receipt of request therefor from Developer or any other Owner, the City shall furnish to the Developer, such Owner or such other parties as the Developer or other Owner may specify, an estoppel certificate ("Estoppel Certificate") stating, if true, that the Developer has, to the date of the issuance of such Estoppel Certificate, satisfied Developer's contractual obligations with

respect to the Project Property, or the particular Parcel within the Project Property referred to in the Estoppel Certificate or, if the Developer has not satisfied its contractual obligations, stating those obligations that the Developer has not satisfied and such other matters as may be reasonably requested. Upon issuance of an Estoppel Certificate, the City shall be estopped to deny the truth of any statement made in such Estoppel Certificate. If the City fails timely to execute and deliver such Estoppel Certificate, the Developer and any third party may conclusively presume and rely upon the following facts:

(a) That the terms and provisions of this Agreement have not been changed except as represented by the Developer;

(b) That the Developer has obtained the approvals of the City as set forth in the Developer's statements;

(c) That the Developer is not in breach or default under the terms and provisions of this Agreement.

14.5 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

14.6 Successors and Assigns. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

14.7 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

14.8 Attorneys' Fees. If a party commences any actual litigation against the other party in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of the prevailing party's costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

14.9 Severability. If any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

14.10 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

14.11 Entire Agreement. This Agreement and the Purchase Agreement constitute the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, including, without limitation, the Master Development Agreement as it applies to the Project Property and the rights and obligations of the parties with respect thereto, are hereby superseded and merged herein. To the extent there is any inconsistency between this Agreement and the terms of the Purchase Agreement, the terms of the Purchase Agreement shall control.

14.12 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument.

14.13 Recordation of Agreement. The City shall cause this Agreement to be recorded in the Official Records of Maricopa County, Arizona, at any time after its approval and execution by the City.

14.14 Manager's Power to Consent. The City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the Developer and/or the development of the Project Property, and hereby authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any further amendment or modification of this Agreement.

14.15 Consents and Approvals. Except as may be otherwise set forth in this Agreement, the City and Developer shall at all times act reasonably with respect to any and all matters that require any party to review, consent or approve of any act or matter hereunder.

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the Developer has executed and sealed the same on or as of the day and year first above written.

ATTEST:

"CITY"

THE CITY OF TEMPE, an Arizona municipal corporation

_____
City Clerk

APPROVED AS TO FORM:

By_____
Neil Giuliano, Mayor

_____
City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2001, before me, the undersigned officer, personally appeared Neil Giuliano, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his _____, and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

_____
Notary Public

"DEVELOPER"

MCW TEMPE MILL L.L.C., an Arizona limited liability company
By: MCW Holdings, L.L.C., its manager

By_____
Name_____
Title_____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2001, before me, the undersigned officer, personally appeared _____ who acknowledged him/herself to be the _____ of MCW TEMPE MILL L.L.C., an Arizona limited liability company, whom I know personally/whose identity was proven to me on the oath of _____, a credible witness by me duly sworn/whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument/whose identity I verified on the basis of his/her _____, and s/he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

_____
Notary Public

NOTARY SEAL:

Exhibit "A"	-	The Project Property
Exhibit "A-1"	-	The City Property
Exhibit "A-2"	-	The Developer's Property
Exhibit "A-3"		The Park Property
Exhibit "A-4"		The City Park Property
Exhibit "B"	-	The Remaining Property
Exhibit "C"	-	Hayden Ferry-South Performance Schedule
Exhibit "D"	-	The Streetscape Improvements
Exhibit "E"	-	The Conceptual Plan
Exhibit "F"	-	Building Construction and Occupancy Easement
Exhibit "G"		Transit Right-of-Way

EXHIBIT "C"

Hayden Ferry-South Schedule of Performance

1. Commencement of Construction of: (a) at least 100,000 sq. ft (office/retail); and (b) at least 48 units of Residential (approx. 60,000 sq. ft.)	On or before September 30, 2002
2. Certificate of Completion for: (a) at least 160,000 sq. ft. (office/retail); and (b) at least 48 units of Residential	On or before June 30, 2004
3. Building Permits for construction of at least eighty percent (80%) of the building square footage planned for development within the Project Property as shown on the Conceptual Development Plan for the Project Property, as modified and amended from time to time with the approval of the City	On or before June 30th, 2006
4. Certificate of Completion for: construction of at least eighty percent (80%) of the building square footage planned for development within the Project Property as shown on the Conceptual Development Plan for the Project Property, as modified and amended from time to time with the approval of the City	On or before September 30th, 2008